

## LAW ENFORCEMENT COOPERATION ACT OF 2006

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JULY 14, 2006.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. SENSENBRENNER, from the Committee on the Judiciary,  
submitted the following

### R E P O R T

together with

### ADDITIONAL VIEWS

[To accompany H.R. 4132]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4132) to amend title 18, United States Code, to provide penalties for officers and employees of the Federal Bureau of Investigation who obtain knowledge of criminal conduct within the jurisdiction of State and local prosecutors and fail to so inform those prosecutors, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

#### SECTION 1. SHORT TITLE.

This Act may be cited as the “Law Enforcement Cooperation Act of 2006”.

#### SEC. 2. F.B.I. FAILURE TO INFORM STATE AND LOCAL OFFICIALS OF CRIMES WITHIN THEIR JURISDICTION.

(a) IN GENERAL.—Chapter 73 (relating to obstruction of justice) of title 18, United States Code, is amended by adding at the end the following:

##### **“§ 1521. F.B.I. failure to inform State and local officials of crimes within their jurisdiction**

“(a) FAILURE TO INFORM STATE AND LOCAL OFFICIALS.—Whoever, being an officer or employee of the Federal Bureau of Investigation, obtains information that a confidential informant or other individual has committed a serious violent felony (as defined in section 3559 of title 18) in violation of State or local law and knowingly and intentionally fails to promptly inform the chief State law enforcement officer and local prosecuting official, shall be fined under this title or imprisoned not more than 5 years, or both.

“(b) NOTIFICATION TO THE ATTORNEY GENERAL.—The Federal Bureau of Investigation shall notify the Attorney General that such officer or employee has provided information pursuant to this section.”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by adding at the end the following new item:

“1521. F.B.I. failure to inform State and local officials of crimes within their jurisdiction.”.

## PURPOSE AND SUMMARY

H.R. 4132, the “Law Enforcement Cooperation Act,” provides for the imposition of criminal penalties upon an officer or employee of the Federal Bureau of Investigation who knowingly and intentionally fails to promptly inform the chief State law enforcement officer and local prosecuting official that a confidential informant or other individual has committed a serious violent felony (as defined in section 3559 of title 18) in violation of State or local law. An offense under this section is punishable by a fine or imprisonment up to five years, or both. The officer or employee must promptly notify the Attorney General that such officer or employee has provided information under this section.

## BACKGROUND AND NEED FOR THE LEGISLATION

### A. HOUSE COMMITTEE ON GOVERNMENT REFORM

On November 20, 2003, the House Committee on Government Reform submitted a report entitled, “Everything Secret Degrades: The FBI’s Use of Murderers as Informants” following an extensive Committee investigation. While the report focused on activities in the FBI Boston Field Office, it concluded generally that, beginning in the 1960s, Federal law enforcement officials chose to use dangerous criminals as informants and in turn protected them from the consequences of their crimes. These crimes include the murder of a number of men who were killed because they came to the government with information incriminating certain informants but whose identity subsequently was disclosed to the informants themselves.<sup>1</sup>

As a result of the Committee on Government Reform’s investigation, the FBI re-engineered the administration and operation of human sources. This effort was to include the centralization of the administration of all human factors; the development of a “Risk Factor Model”; and for certain categories of human sources, implementation of a validation process. Further, the FBI undertook a review of its Office of Professional Responsibility to ensure that the system of internal discipline was effective in deterring misuse of Confidential Informants.

### B. HOUSE COMMITTEE ON THE JUDICIARY

In February 2004, the House Committee on the Judiciary, pursuant to its oversight responsibilities, resumed a review of the FBI’s Confidential Informant program, including its guidelines, policies, and practices. While the Government Reform investigation highlighted the problems in the Boston field office, the Judiciary Com-

<sup>1</sup> Union Calendar No. 237, 108th Congress 2d Session, Third Report by the Committee on Government Reform, “Everything Secret Degrades: The FBI’s Use of Murderers as Informants,” at 135. Available at: <http://reform.house.gov/>

mittee examined the FBI's development of confidential informants and whether or not the Boston field office was representative of general problems existing throughout the agency's confidential informant program or simply an isolated incident. The Committee also examined the reforms promised to the Committee on Government Reform by Director Robert Mueller in November of 2003,<sup>2</sup> as well as a review of compliance with the Confidential Informant Guidelines, revised in January 2001, that among other things, established the Confidential Informant Review Committee. To pursue its oversight investigation, the Committee conducted numerous meetings and sent correspondence to various State and Federal agencies, including the Department of Justice.

C. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL'S REPORT, "THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES."

In September 2005, the Department of Justice Office of the Inspector General (OIG) released a report entitled, "The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines" (the Report). OIG examined four areas of FBI's compliance with the Attorney General's Investigative Guidelines (Guidelines). The four areas examined were: Confidential Informants; Undercover Operations; General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations; and Consensual Monitoring. In the Report, the OIG reviewed the FBI's implementation of the revised guidelines with two main objectives: (1) to assess the FBI's compliance with the revised guidelines; and (2) to evaluate the procedures that the FBI employed to ensure that the revised Guidelines were properly implemented. The most significant problems cited were failures to comply with the Confidential Informant Guidelines. In fact, the OIG identified one or more Guideline violations in 87 percent of the confidential informant files examined.<sup>3</sup>

The Report issued by the OIG was the culmination of an exhaustive review regarding various issues of compliance with the Guidelines. The Guidelines were adopted in 1976, with revisions added periodically at the behest of the then-Attorney General, and were adopted in place of statutory recourse for the FBI and other Federal Law Enforcement Agencies.<sup>4</sup> The latest revision of the Attorney General's Guidelines, the Ashcroft Guidelines, were adopted without the customary Congressional consultation.<sup>5</sup> In the past the Attorney General and FBI Leadership have uniformly agreed that the Guidelines were necessary and desirable, and that the FBI's adherence to the Guidelines were the reason why the FBI should not be subjected to a general legislative charter or to statutory control.<sup>6</sup> However, failure to adequately comply with the Guidelines brings into question whether legislative alternatives may be necessary.

<sup>2</sup>Id. at 136.

<sup>3</sup>The Department of Justice Office of the Inspector General Report, "The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines," at 2.

<sup>4</sup>Id. at 36.

<sup>5</sup>Id. at 19.

<sup>6</sup>Id. at 59.

Although the Report looked at the general compliance by the FBI with several portions of the Guidelines, the relevant portion for the purposes of this legislation is that addressing the Bureau's effectiveness regarding Agent relationships with Confidential Informants (CIs), an area that the Report identified as the most problematic.<sup>7</sup>

Twelve FBI offices of various sizes were selected and a random sampling of between 9 to 11 CI files from each office (for a total of 120) were selected in order to ascertain compliance levels. In addition, various personnel from the FBI and U.S. Attorney's offices were interviewed to supplement and explain the results of the file analysis. The OIG determined that there existed at least one compliance error in 87 percent of the files examined.<sup>8</sup> As an explanation for this finding, personnel from field offices, as well as personnel from FBI Headquarters, indicated that the Guidelines are too cumbersome and, as such, discourage agents from adhering to the Guidelines. Similarly, a majority of the Special Agents in Charge (SAC) indicated that while they believed the Guidelines are realistic, the accompanying paperwork is too cumbersome.<sup>9</sup> These complaints about and failure to adhere to the Guidelines is an apparent departure from previous feedback about the priority placed on adherence to the Guidelines, as indicated by former FBI Director William Webster who stated that the Guidelines were "scrupulously observed" in regard to handling informants.<sup>10</sup>

Furthermore, the GIG found significant problems in the FBI's compliance with the Guidelines occurring primarily in the areas of: suitability reviews; cautioning of informants about the limits of their activities; the authorization of otherwise illegal activity; documentation and notice of unauthorized illegal activity by informants; and the deactivation of informants.

### *1. Initial and continuing suitability reviews*

Suitability reviews (a list of 17 different factors which, collectively, will help to inform on the initial suitability determination of a CI) are the initial reviews undertaken by Agents and their supervisors to evaluate the suitability of those whom they propose to operate as CIs. Of the files that the OIG reviewed, 44 percent were newly opened files and required an Initial Suitability Report and Recommendation (ISR&R). Of those requiring an ISR&R, 34 percent of those reviewed did not contain documentation of at least one required suitability factor, the most common of which were:

- a. The extent to which the CI's information or assistance could be corroborated;
- b. The extent to which the CI's information or assistance would be relevant to a present or potential investigation or prosecution and the importance of such an investigation or prosecution; and

<sup>7</sup> The Department of Justice Office of the Inspector General Report, "The Federal Bureau of Investigations Compliance with the Attorney General's Investigative Guidelines," at 2.

<sup>8</sup> Id. at 7.

<sup>9</sup> Id. at 8.

<sup>10</sup> Id. at 65, citing Webster, The Director: Why the FBI Needs Undercover Snoops, Los Angeles Herald Examiner, June 2, 1978, at A-21.

c. The nature of any relationship between the CI and the subject or target of an existing or potential investigation or prosecution.<sup>11</sup>

## 2. Instructions

Once the CI is registered, the case agent must review with the CI, in the presence of another agent, written instructions or admonishments detailing the constraints under which the CI is to operate. Of the 120 CI files reviewed, 22 percent lacked the documentation that all required instructions were given and acknowledged.<sup>12</sup>

## 3. Authority to engage in otherwise illegal activity (OIA)

OIA is activity that would be criminal absent permission granted by the government. This is normally done to enable CIs to have greater access to criminal activity, which in turn aids the Agency in preventing more substantial crimes. Tier 1 OIA, which involves the more serious crimes, must be authorized by the FBI Assistant Director in Charge or SAC of the appropriate Field Office or Division and the appropriate U.S. Attorney in advance and in writing, and must not exceed 90 days of effectiveness. Tier 2 OIA may be authorized for a period not to exceed 90 days by a senior field manager. In any case, an analysis must be made by those who are approving the OIA that documents the conclusion that the benefits to be obtained by the CI's participation in the OIA outweigh the risks or harm caused by the specific act or acts being authorized.<sup>13</sup>

OIA is one of the most sensitive areas of CI management. As such, some of the findings of the OIG may be a cause for concern. OIG indicated that upon interviewing Confidential Informant Coordinators (an administrative position charged with the maintenance of administrative and coordinative efforts related to the handling of CIs) in the FBI field offices, only 52 percent reported that they believed Agents in their offices obtain the required written acknowledgments in all cases.<sup>14</sup> In the twenty-five informant files regarding cases in which OIA was authorized, two were Tier 1 OIA and the other twenty-three were exclusively Tier 2 OIA. Of the twenty-five files, 60 percent reflected compliance deficiencies. The deficiencies included OIA authorizations for sources who had not yet been registered as CIs, retroactive authorizations of OIA, authorizations of Tier 2 OIA that should have been denominated as Tier 1 (and therefore required DOJ approval), insufficiently specific descriptions of the OIA, failures to obtain the CI's written acknowledgment of instructions regarding the limits of OIA activities, and failures to provide required instructions to the CI.<sup>15</sup> Perhaps one of the most disturbing facts is that in two of the Tier 1 OIA files, the FBI failed to obtain proper authorization from the U.S. Attorney with respect to the concurrence and authorization of the activity, thereby circumventing prosecutorial review and acquiescence.

<sup>11</sup>Id. at 97.

<sup>12</sup>Id. at 99.

<sup>13</sup>Id. at 103.

<sup>14</sup>Id. at 104.

<sup>15</sup>Id. at 105.

#### 4. *Unauthorized illegal activity (UIA)*

The FBI is required to notify either a U.S. Attorney or the head of a DOJ litigating component when a CI engages in illegal activity that has not been previously authorized. Five of the cases reviewed required the FBI to notify the U.S. Attorney of the activity and in two cases (40 percent) the FBI failed to do so in violation of the Guidelines.<sup>16</sup>

#### 5. *Deactivation of CIs*

When a CI is deactivated, the Guidelines require the FBI to maintain appropriate documentation in the CI's file of certain notifications to the CI and to FBI Headquarters and DOJ personnel. Of the relevant files reviewed, 37 percent contained one or more deficiencies in documenting these notifications.<sup>17</sup>

#### 6. *OIG analysis*

The OIG indicated several reasons that may attribute to the overall lack of compliance by FBI agents:

- Inadequate administrative support for the Criminal Informant Program, including the failure to provide standardized forms, a field guide, and Intranet tools;
- Failure by executive managers to hold first-line supervisors accountable for compliance deficiencies and to exercise effective oversight of agents operating confidential informants;
- Inadequate training at every level, including periodic training on the Guidelines themselves and joint training with the U.S. Attorneys' Offices on appropriate methods to operate CIs;
- Inadequate support of Confidential Informant Coordinators and assignment of this responsibility as a collateral duty;
- Failure to take compliance performance into account in personnel and promotion decisions and policies; and
- Lingering differences between the FBI and DOJ over informant issues.<sup>18</sup>

Congressional oversight by the Government Reform and Judiciary Committees, as well as the detailed findings by the OIG, demonstrate a need for a legislative, rather than executive, solution to the deficient compliance with the Guidelines by the FBI. The need for a Congressional response is compounded by events in recent years including the 2002 adoption of revised Guidelines by the Department of Justice without the customary Congressional approval and the prosecution of two FBI agents, John J. Connolly, Jr. and R. Lindley DeVechhio, relating to their complicity in crimes of violence committed by confidential informants.

### HEARINGS

The Committee on the Judiciary held no hearings on H.R. 4132.

### COMMITTEE CONSIDERATION

On July 12, 2006, the Committee on the Judiciary met in open session and ordered favorably reported the bill, H.R. 4132, with an

<sup>16</sup>Id. at 108.

<sup>17</sup>Id. at 109.

<sup>18</sup>Id. at 115–116.

amendment in the nature of a substitute by voice vote, a quorum being present.

#### VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that there were no recorded votes during the Committee consideration of H.R. 4132.

#### COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

#### NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

#### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4132, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

JULY 4, 2006.

Hon. F. JAMES SENSENBRENNER, Jr.,  
*Chairman, Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4132, the Law Enforcement Cooperation Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DONALD B. MARRON,  
*Acting Director.*

Enclosures.

#### *H.R. 4132—Law Enforcement Cooperation Act of 2005*

CBO estimates that implementing H.R. 413 would have no significant cost to the federal government. Enacting the bill could affect direct spending and revenues, but CBO estimates that any such effects would not be significant. H.R. 4132 contains no inter-governmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no direct costs on state, local, or tribal governments.

H.R. 4132 would establish a new federal crime for the failure of Federal Bureau of Investigation (FBI) employees to inform state and local law enforcement officials about certain crimes committed

in their jurisdictions. Because the bill would establish a new offense, the government would be able to pursue cases that it otherwise would not be able to prosecute. We expect that H.R. 4132 would apply to a relatively small number of offenders (i.e., certain FBI employees), however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 4132 could be subject to criminal fines, the federal government might collect additional fines if the legislation is enacted. Criminal fines are recorded as revenues, then deposited in the Crime Victims Fund and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the small number of cases likely to be affected.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

#### PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4132 is intended to promote notification to State and local law enforcement by the FBI regarding the commission of a serious violent felony by a confidential informant or other individual.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 of the Constitution.

#### SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee.

##### *Section 1. Short title*

This section provides that the Act may be cited as the “Law Enforcement Cooperation Act of 2005.”

##### *Section 2. FBI failure to inform State and local officials of crimes within their jurisdiction*

This section amends the federal criminal code to prescribe penalties to be imposed on any officer or employee of the Federal Bureau of Investigation (FBI) who obtains information that a confidential informant or other individual has committed a serious violent felony (as defined in section 3559 of title 18) that violates State or local law and who knowingly and intentionally fails to promptly inform the chief State law enforcement officer and local prosecuting official. An offense under this section is punishable by fine or imprisonment up to five years, or both. The FBI is required to notify the Attorney General that an officer or employee has provided information under this section.



## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

## CHAPTER 73 OF TITLE 18, UNITED STATES CODE

## CHAPTER 73—OBSTRUCTION OF JUSTICE

Sec.

1501. Assault on process server.

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1521. *F.B.I. failure to inform State and local officials of crimes within their jurisdiction.*

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**§ 1521. *F.B.I. failure to inform State and local officials of crimes within their jurisdiction***

(a) *FAILURE TO INFORM STATE AND LOCAL OFFICIALS.*—Whoever, being an officer or employee of the Federal Bureau of Investigation, obtains information that a confidential informant or other individual has committed a serious violent felony (as defined in section 3559 of title 18) in violation of State or local law and knowingly and intentionally fails to promptly inform the chief State law enforcement officer and local prosecuting official, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) *NOTIFICATION TO THE ATTORNEY GENERAL.*—The Federal Bureau of Investigation shall notify the Attorney General that such officer or employee has provided information pursuant to this section.

#### ADDITIONAL VIEWS OF HON. JEFF FLAKE

I have serious concerns regarding H.R. 4132 and its impact on covert investigations by the Federal Bureau of Investigation (FBI). It is important to note that the FBI does not support this legislation because they believe that the bill will compromise their covert activity in a significant way.

H.R. 4132 would impose stiff prison terms of up to five years on Federal Bureau of Investigation agents who knowingly fail to promptly tell local or state law enforcement authorities if FBI informants commit serious felonies. Some of these felonies, such as robbery, may be committed by an informant who is deep within a terrorist cell here in the United States, or be an informant in the inner circle of the Russian mob. Do we compromise those investigations by reporting those crimes to local officials, or do we let these informants give us enough information to arrest an entire cell or crime syndicate?

Murder is a serious crime and any informant who commits murder should be prosecuted to the fullest extent of the law. However, it is important to note that the FBI has a process in place to handle such incidents. Crimes by informants are to be reported up the chain of command, per the Department of Justice's own regulations. It's already illegal for an agent to fail to report a crime like murder committed by an informant and, in the case of Boston Mob Boss Whitey Bulger, one agent has already gone to jail for failing to do so.

Intelligence gathering requires dealing with unsavory characters, as any field agent in the FBI, CIA or DEA will tell you. We must allow the FBI to do its job, and focus on stopping the next terrorist attack. I believe this bill hampers that mission to no small degree.

JEFF FLAKE.

#### ADDITIONAL VIEWS OF HON. WILLIAM DELAHUNT

The gentleman from Arizona, Mr. Flake, expresses concern that the FBI opposes this legislation. The FBI's opposition to this bill is consistent with what at least one court determined to be an "enduring culture of resistance" to information-sharing with state and local prosecutors and law enforcement authorities. This is precisely the flaw at the core of the problems identified in reports produced by both the Judiciary Committee and the Committee on Government Reform, as well as the report of the Department of Justice Inspector General. It is exactly why this legislation is essential.

Mr. Flake argues that this bill is unnecessary because "the FBI has a process in place to handle such incidents." He is correct that there is a process outlined in the Attorney General's Investigative Guidelines for sharing information with state and local law enforcement. It is the FBI's long-standing willful disregard of that "process" and the violent crimes that have resulted that led us to H.R. 4132.

This legislation is not about the failure of one agent, but many agents and supervising agents of the FBI. The agent to which Mr. Flake refers in the Bulger case was prosecuted and jailed for his own criminal involvement in the criminal activities of his informants, not because of his failure to comply with the Attorney General's Guidelines.

The reports of two House Committees and the Department of Justice's own Inspector General acknowledge that the FBI's failure to follow the Attorney General's Investigative Guidelines is a chronic problem. Given that these and wrongful death suits against the government have not been sufficient incentive to encourage compliance, criminal penalties are necessary.

WILLIAM D. DELAHUNT.

MATERIAL SUBMITTED ON BEHALF OF HON. WILLIAM DELAHUNT

To accompany H.R. 4132, the “Law Enforcement Cooperation Act,” I submit the Executive Summary from the Report entitled, “The Federal Bureau of Investigation’s Compliance with the Attorney General’s Investigative Guidelines.”

EXECUTIVE SUMMARY \*

*I. Overview*

After the September 11, 2001, terrorist attacks, the Department of Justice (DOJ or Department) initiated a comprehensive review of four sets of the Attorney General’s Investigative Guidelines (Guidelines or Investigative Guidelines) that govern most aspects of the Federal Bureau of Investigation’s (FBI) authority to investigate crimes committed by individual criminals, criminal enterprises and groups, as well as those who may be threatening to commit crimes. The purpose of the review was to identify changes to the Guidelines that would enhance the Department’s ability to detect and prevent terrorist attacks. The four Guidelines are:

- The Attorney General’s Guidelines Regarding the Use of Confidential Informants (Confidential Informant Guidelines);
- The Attorney General’s Guidelines on Federal Bureau of Investigation Undercover Operations (Undercover Guidelines);
- The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (General Crimes Guidelines); and
- Procedures for Lawful, Warrantless Monitoring of Verbal Communications (Consensual Monitoring Guidelines).

On May 30, 2002, the Attorney General approved revisions to each of these Guidelines.

The Department of Justice Office of the Inspector General (OIG) conducted this review of the FBI’s implementation of the revised Investigative Guidelines with two main objectives: (1) to assess the FBI’s compliance with the revised Guidelines; and (2) to evaluate the procedures that the FBI employed to ensure that the revised Guidelines were properly implemented.

Our review was conducted in five phases. The first phase consisted of background interviews of key program managers at FBI Headquarters and an extensive document review. The second phase consisted of interviews of FBI Headquarters and DOJ personnel who oversee critical aspects of the substantive programs governed by the Guidelines. In the third phase, we surveyed three groups of Special Agents in the FBI’s 56 field offices who played key roles in

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\* The full version of this report includes a limited amount of information that the Federal Bureau of Investigation (FBI) considered to be law enforcement sensitive and therefore could not be publicly released. To create this public version of the report, the OIG redacted (deleted) the portions of the full report that were considered sensitive by the FBI, and we indicated where those redactions were made.

promoting adherence to the Guidelines: Confidential Informant Coordinators; Undercover Coordinators; and Division Counsel, who serve as chief legal advisers in the field offices. We also conducted another survey of the Criminal Division Chiefs of the 93 U.S. Attorneys' Offices. That survey focused on the Guidelines' provisions requiring approval, concurrence, or notification to U.S. Attorneys' Offices relating to significant Guidelines-related authorities.

The fourth phase of our review consisted of 12 FBI field office site visits during which we reviewed a judgmental sample of FBI investigative and administrative files reflecting use of the authorities or operational techniques authorized by the Guidelines. In that sample of files, we also reviewed the various forms and other administrative paperwork supporting the activities governed by the Guidelines.<sup>1</sup> Following our field office visits, we interviewed the senior manager of each of those field offices—either the Assistant Directors in Charge or Special Agents in Charge (SACs).<sup>2</sup>

During the fifth phase of the review, after analyzing the data from FBI Headquarters and the 12 field offices and the other documents produced by the FBI and the DOJ, including more than 40 triennial FBI Inspection Reports generated by the FBI's Inspection Division, we interviewed several senior FBI officials in Headquarters about organizational and other plans that could affect Headquarters and field supervision of the authorities governed by the Guidelines. We also interviewed the FBI Director in April 2005.

We now summarize some of the key findings regarding each set of the Guidelines which we explain in greater detail later in this Executive Summary.

We found that the FBI's compliance with each of the four Investigative Guidelines differed considerably by Guideline and field office. The most significant problems were failures to comply with the Confidential Informant Guidelines. For example, we identified one or more Guidelines violations in 87 percent of the confidential informant files we examined. By contrast, we found approximately 90 percent of the undercover operations and consensual monitoring files we reviewed contained no authorization-related Guidelines deficiencies.

*Confidential Informant Guidelines.* Our review found that FBI Headquarters has not adequately supported the FBI's Criminal Informant Program, which has hindered FBI agents in complying with the Confidential Informant Guidelines. Although we noted some improvements in this area during the course of our review, in many instances agents lacked access to basic administrative resources and guidance that would have promoted compliance with the Confidential Informant Guidelines. For example, the FBI did not have a field guide or standardized and up-to-date forms and compliance checklists. The FBI also did not plan for, or provide, adequate training of agents, supervisors, and Confidential Informant Coordinators on informant policies and practices.

<sup>1</sup>We included in our field office site visits six of the largest FBI field offices: New York, Washington, D.C., Los Angeles, Chicago, Miami, and Boston; four medium-sized field offices: Denver, Salt Lake City, Portland, and Buffalo; and two of the smaller field offices: Columbia, S.C., and Memphis.

<sup>2</sup>The senior field managers of the FBI's larger field offices are designated Assistant Directors in Charge. However, for convenience, throughout this report we refer collectively to the senior field managers as SACs.

*Undercover Operations Guidelines.* We found that the FBI generally was compliant with the Undercover Guidelines and that the Headquarters unit supporting undercover operations was well managed and effective. That unit generates an up-to-date field guide and standardized forms, and it uses technology, such as a centralized database which permits effective monitoring of undercover operations, to aid field office compliance with the Undercover Guidelines and Headquarters oversight of the Guidelines.

*General Crimes Guidelines.* We found that the FBI generally adhered to the provisions of the General Crimes Guidelines. For example, 71 of the 72 files we reviewed identified appropriate predication in the case opening memorandum and, when disseminating information regarding these investigations to other law enforcement agencies, the FBI consistently documented an adequate basis to do so, in conformity with the Guidelines. However, the FBI has not developed adequate controls to ensure that notifications to U.S. Attorneys, DOJ and FBI Headquarters are made on a timely basis and documented in the case files, that authorizations for the extension and renewal of preliminary inquiries and for the conversion of preliminary inquiries to full investigations are documented, that SAC reviews of criminal intelligence investigations are documented, and that progress reports to DOJ on terrorism enterprise investigations lasting for more than 180 days are included in the files.

We also reviewed the FBI's new authorities in Part VI of the General Crimes Guidelines, which allow FBI agents to visit public places and attend public events to detect or prevent terrorist activities in the absence of any particularized evidence that a crime has occurred or is likely to occur. We found that the FBI encourages but does not require agents to obtain supervisory approval prior to visiting public places or attending public events. Moreover, neither FBI field offices nor Headquarters consistently maintains records regarding the use of and compliance with these authorities, including the provisions that address the FBI's authority to collect, maintain, and disseminate information obtained at such events, and provisions forbidding retention of certain information. Without access to data reflecting approval or documentation of such visits, we were unable to draw conclusions about the FBI's utilization of these authorities or its record of compliance with Part VI authorities.

*Consensual Monitoring Guidelines.* The Attorney General Guidelines governing consensual monitoring cover non-telephonic consensual monitorings, which include the use of body recorders and transmitting devices. We found that the FBI was generally in compliance with the Consensual Monitoring Guidelines, although we identified deficiencies, particularly with regard to the Guidelines' requirements for supervisory authorization.

*FBI Oversight of Compliance with Attorney General Guidelines.* The FBI and DOJ have various mechanisms to promote compliance with each of the Investigative Guidelines, including first-line field supervisors; the expertise of field office Confidential Informant Coordinators, Undercover Coordinators, and Division Counsel; two joint FBI-DOJ committees (the Criminal Undercover Operations Review Committee (CUORC) and the Confidential Informant Re-

view Committee (CIRC)) which approve certain undercover operations and confidential informants; the FBI's Inspection Division; the employee disciplinary process; and various policy manuals.

We found that the joint review committees were operating effectively and in accordance with assigned missions. However, we found that field supervisors frequently were not held accountable for compliance violations, particularly in the Criminal Informant Program, and that the FBI at times failed to ensure that FBI personnel with special expertise and responsibility for issues addressed in the Guidelines, such as Informant Coordinators, Undercover Coordinators, and Division Counsel, were properly consulted regarding investigative activities. Our review also found that the Inspection Division's triennial audits were useful in promoting compliance, but were not sufficiently comprehensive and did not adequately address the underlying causes of Guidelines violations.

*Implementation of the Guidelines.* The process adopted by the FBI to implement the revised Guidelines was not optimal. Although several FBI components performed these duties well—particularly the Office of the General Counsel and the Undercover and Sensitive Operations Unit (USOU) within the Criminal Investigative Division (CID)—we found inadequate interdivision planning, coordination and direction. This hindered provision of necessary training for FBI employees on the revised Guidelines and also resulted in the failure to timely update standardized forms, inspection checklists, and other technical support. In addition, the lack of adequate case management and other information technology tools hindered the FBI's ability to identify, track, and evaluate its compliance with the Guidelines.

In the next section of this Executive Summary, we summarize in greater detail the contents of the report including the background of the revised Guidelines, the scope and methodology of our review, our findings and conclusions regarding the FBI's compliance with each of the four Investigative Guidelines, the oversight mechanisms used to promote Guidelines compliance, the implementation process, and our recommendations to address the issues identified in the report.<sup>3</sup>

## *II. Background*

The four Investigative Guidelines govern the FBI's use of general crimes investigations to develop evidence about the commission of federal crimes and the FBI's use of criminal intelligence investigations to develop evidence about the nature, size, and composition of ongoing criminal enterprises where the objective may not necessarily be to prosecute but to determine whether a pattern of criminal activity exists. The Investigative Guidelines also constrain the FBI's use of three key techniques used to conduct general crimes and criminal intelligence investigations: the use of confidential informants, undercover operations, and non-telephonic consensual monitoring of verbal communications.

The first Attorney General Investigative Guidelines were issued in 1976 by Attorney General Edward Levi following congressional

<sup>3</sup> Individual recommendations are provided at the end of Chapters Three through Eight of the report. A complete list of recommendations is provided in Appendix E.

hearings and published reports criticizing the FBI's domestic surveillance activities in the 1950s and 1960s that targeted protest groups and others. Since then, the Guidelines have been revised by virtually every Attorney General, often after allegations of abuse by the FBI in the use of the authorities permitted by the Guidelines.

The Investigative Guidelines apply to the FBI and in some cases other Justice Law Enforcement Agencies (JLEAs) or components of the United States Government.<sup>4</sup> The Guidelines set forth detailed procedures and review mechanisms to ensure that law enforcement authorities are exercised appropriately and with adequate oversight, both in the field and, with respect to certain authorities or sensitive investigations, at FBI Headquarters and DOJ. For example, the Guidelines require that before FBI agents employ certain intrusive investigative techniques, sufficient evidentiary predication must be established. The Guidelines also require agents to ensure that confidential informants working for the FBI are suitable and understand the limits on their activities, including their authority to engage in actions that would be illegal if engaged in by someone without such authority; that undercover operations used to develop evidence to prosecute white collar crimes, public corruption, terrorism, and other crimes are approved only after a thorough review of the risks and benefits of the operation; and that before the FBI intercepts and monitors oral non-telephonic communications without the consent of all parties, there is careful review of the reasons for the monitoring, the duration of the monitoring, the location of the monitoring, and the nature of any danger to the party consenting to the monitoring.

### *III. The scope and methodology of the OIG review*

The OIG review was conducted by a team of attorneys, inspectors, auditors, and paralegals. The OIG team conducted interviews of over 70 officials and employees at FBI Headquarters, typically Unit Chiefs, Section Chiefs, and Assistant Directors. We attended dozens of meetings of the CIRC and the CUORC. We also examined over 2,000 FBI documents from FBI Headquarters' operating and support divisions. Among the documents we analyzed were investigative case file, Headquarters guidance memoranda, correspondence, and reports by the FBI's Inspection Division, Undercover and Sensitive Operations Unit (USOU), and the FBI Office of Professional Responsibility (OPR).

In addition, the OIG surveyed four groups within the FBI and DOJ who work with the Guidelines on a daily basis. We surveyed the FBI's Confidential Informant Coordinators, its Undercover Coordinators, and its Division Counsel, all of whom work in the 56 FBI field offices around the country. In addition, because U.S. At-

<sup>4</sup>In addition to the FBI, the JLEAs bound by the Confidential Informant Guidelines are the Drug Enforcement Administration (DEA), United States Marshals Service, and the Department of Justice Office of the Inspector General. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) became a Department of Justice Law Enforcement Agency (JLEA) effective in January 2003 and therefore is subject to the Attorney General's Guidelines Regarding the Use of Confidential Informants. ATF told the OIG that it is adapting its orders concerning the use of confidential informants and the conduct of undercover operations orders to conform fully with the Attorney General's Guidelines and anticipates that it will soon be forwarding draft Orders on these subjects to the Criminal Division for review. The General Crimes and Undercover Guideline apply only to the FBI. The Consensual Monitoring Guidelines apply to all Executive Branch departments and agencies.



torneys' Offices have responsibility for approving or concurring in certain authorities in the Guidelines, or are required to be notified of certain activities or developments, we also surveyed the Chiefs of the Criminal Division of the 93 U.S. Attorneys' Offices.

After receiving the survey results we visited FBI field offices from May through August 2004. OIG teams traveled to 12 FBI field offices to conduct interviews and examine a judgmental sample of nearly 400 administrative and investigative files pertaining to investigations governed by the revised Investigative Guidelines during the period May 30, 2002, to May 30, 2004. We examined this sample of individual investigative and administrative files to determine whether key provisions of the Investigative Guidelines were followed.

In addition to our review of case files, we assessed the steps the FBI took to implement the revised Guidelines. In this portion of our review, we assessed the FBI's planning, communication, guidance, and training for implementation of the revised Guidelines. We also evaluated the FBI's mechanisms to ensure compliance, including the role of Supervisory Special Agents and senior managers in FBI field offices, the FBI's Inspection Division, on-site reviews conducted by units within FBI Headquarters' operating divisions, and the FBI disciplinary process.

Toward the end of our review we conducted interviews of the SACs of the 12 field offices we visited. We also interviewed three FBI Executive Assistant Directors and the FBI Director.

#### *IV. OIG findings*

##### *A. The Attorney General's Guidelines Regarding the Use of Confidential Informants*

The Attorney General's Guidelines on Confidential Informants are designed to ensure that proposed confidential informants undergo thorough scrutiny for suitability before they are approved and periodically thereafter; are warned about the limits on their authority by means of instructions that must be administered at least annually; and are authorized to engage in otherwise illegal activities that are justified in unusual circumstances only after such activities are carefully defined and their scope is approved by responsible DOJ and FBI personnel. The Guidelines also provide that when an informant engages in unauthorized illegal activity, it is promptly reported to FBI Headquarters and the appropriate prosecutor. They also require that if an informant is deactivated, whether for "cause" or other reasons, the deactivation is properly recorded, the confidential informant and appropriate FBI and DOJ personnel are notified, and any authority to engage in otherwise illegal activity is revoked.

We found significant problems in the FBI's compliance with Guidelines' provisions. Those violations occurred mainly in suitability reviews; the cautioning of informants about the limits of their activities; the authorization of otherwise illegal activity; documentation and notice of unauthorized illegal activity by informants; and the deactivation of informants. In total, we found one or more

Guidelines compliance errors in 87 percent of the informant files we examined.<sup>5</sup>

These compliance errors are troubling in light of the history of the Confidential Informant Guidelines. As result of a 2-year review after high-profile problems in the FBI informant program came to light in the 1990s, Attorney General Reno issued revised confidential Informant Guidelines in January 2001 that made the approval process for opening and operating informants more rigorous. Attorney General Ashcroft issued further revisions to the Guidelines in May 2002, but left the provisions regarding opening and operating informants essentially unchanged. Yet, when we examined informant files in May 2004 and surveyed FBI field personnel, we found that serious compliance deficiencies still existed with regard to the approval, monitoring, documentation, and notification provisions of the Guidelines.

Throughout our review, we were told by field office and FBI Headquarters personnel that the Confidential Informant Guidelines are cumbersome and the supporting paperwork requirements are onerous, and that these factors combine to discourage agents from developing informants or to use sources who are not formally registered in the informant program. A majority of the SACs in the 12 field offices we visited told us that they believe the Confidential Informant Guidelines are workable and well understood, but that the associated paperwork is too cumbersome.

We found serious shortcomings in the supervision and administration of the Criminal Informant Program. The FBI's Criminal Informant Program lacks adequate administrative and technological support from Headquarters and certain field offices. For example, the FBI has not provided standardized, automated forms to field agents to support their applications for informant-related authorities or a standard field guide describing the requirements to operate confidential informants. In addition, the FBI has provided insufficient training and administrative support to field supervisors and Confidential Informant Coordinators, and does not develop timely compliance data for field managers or FBI Headquarters.<sup>6</sup>

In November 2004, several months after the OIG's field office visit ended, the Criminal Investigative Division (CID) at FBI Headquarters generated a self-assessment in analyzing the field office-

<sup>5</sup> As explained later in this report, we selected a judgmental sample of 120 confidential informant files subject to the May 2002 Guidelines from 12 of the FBI's largest, medium-sized, and smaller field offices. We randomly chose between 9 and 11 of the pertinent files to examine in each field office, except in offices where there were only a small number of files within a certain category of informants, in which case we reviewed all files. We did not pre-select CI files that had been identified as non-compliant by internal FBI inspections or other internal compliance mechanisms, nor did we base our selection of field offices on the compliance record of those field offices or on any other criteria that would produce a bias or skewing of the judgment sample. As is the case, however, with any judgmental sample, one cannot extrapolate with statistical certainty that the non-compliance rate of the entire population of FBI confidential informant files would be identical to the non-compliance rate we found in our sample.

<sup>6</sup> As noted in the FBI's response to the OIG's recommendations (provided in Appendix G), the FBI states that the Directorate of Intelligence (DI) has initiated a "re-engineering" of its Confidential Human Source Program. Because its internal human source policies, practices, and manuals must account for and comply with the Attorney General's Guidelines, the FBI enlisted DOJ to assist in the re-engineering effort. In December 2004, the FBI established a working group, including representatives from DOJ, to revise FBI policies regarding human sources (including confidential informants.) The working group's goals are to develop new guidelines, policies, and processes for the utilization of confidential human sources that are designed to reduce burdensome paperwork, standardize source administration procedures, clarify compliance requirements, and improve Guidelines compliance.

level compliance deficiencies regarding the Confidential Informant Guidelines identified in the course of our review. CID conclude that field agents still were not familiar with the Guidelines' requirements two years after their implementation, executive managers did not exercise effective oversight, FBI case agents and supervisors did not recognize the implications of some of the most serious Guidelines violations, the FBI had not generated basic administrative tools using existing technology and resources to support operation of the program, and the FBI's basic database tools were so archaic that they seriously limited the ability of field office and Headquarters personnel to support Guidelines compliance. The fact that CID's critique found some of the same problems we did underscores the need for decisive action to remedy the systemic problems we found in the Criminal Informant Program.

*B. The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations*

Our findings regarding the Criminal Informant Program are in contrast to our generally favorable findings regarding the FBI's compliance with the Attorney General's Guidelines on FBI Undercover Operations. FBI undercover operations, while more limited in scope than the Criminal Informant Program, entail similar Headquarters and field supervision challenges, operational risks, and administrative support needs. But with a few important exceptions, we found the FBI compliant with the Undercover Guidelines.

For example, we found that the CID's Operational Support Section and USOU were supporting and monitoring undercover operations in field offices and were using technological support and other guidance materials to achieve its objectives. Undercover Coordinators, Division Counsel, and other agents experienced with undercover techniques also assisted with ensuring compliance with the Undercover Guidelines.

In contrast to the 87 percent rate of Guidelines' violations in confidential informant files, our judgmental sample of undercover files in 12 field offices found Undercover Guidelines violations in 12 percent of the files that we examined. These violations concerned the failure to obtain proper authorization for particular undercover activities. Sixty percent of these violations reflected errors relating to field office-approved undercover operations that continued beyond their expiration date or operations in which the FBI participated in a task force that was using undercover techniques. In addition to these authorization violations, 20 percent of the files contained documentation-related errors related to the FBI's Undercover Guidelines compliance responsibilities. These omissions included the failure to document field management reviews of undercover employee conduct, adequately describe "otherwise illegal activity," and include a supporting letter from the U.S. Attorney's Office which made the five required findings. We believe that the majority of these compliance deficiencies likely would have been avoided if the FBI had procedures in place that ensured greater consultation between agents and Undercover Coordinators and Division Counsel. Yet, while not insignificant, we do not believe that these violations reflect the fundamental deficiencies that we encountered in the Criminal Informant Program.

*C. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations*

During our field work, we examined a judgmental sample of 92 general crimes and criminal intelligence investigations files to assess compliance with Guidelines' requirements relating to the initiation of investigations, notification to FBI Headquarters and the appropriate U.S. Attorneys' Offices of specified developments, and the approval by the SAC to use certain authorities.

**General Crimes Investigations**

The General Crimes Guidelines provide direction for initiating and pursuing full investigations where the "facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed." The Guidelines also require that sensitive criminal matters must be brought to the attention of the U.S. Attorney or other appropriate DOJ officials, as well as to FBI Headquarters. Our review found general compliance with these Guidelines. Specifically, we found:

- All but 1 of the 72 files we reviewed contained the required predication in the opening documentation;
- With respect to investigations of sensitive criminal matters, the FBI provided the required notifications to FBI Headquarters and either DOJ or the U.S. Attorney on a consistent basis, although a copy of the written notification was not regularly included in the case files; and
- The FBI consistently documented notification of case closings.

**Criminal Intelligence Investigations**

Criminal intelligence investigations do not focus on the prosecution of completed criminal acts, but instead seek intelligence on criminal enterprises. Criminal intelligence investigations focus on such factors as the size and composition of ongoing criminal enterprises, their geographic dimensions, past activities, intended criminal goals, and capacity to inflict harm. There are two types of criminal intelligence investigations: racketeering enterprise investigations (REIs), which focus on organized crime, and terrorism enterprise investigations (TEIs), which focus on enterprises that seek to further political or social goals through activities that involve force or violence, or that otherwise aim to engage in terrorism or terrorism-related crimes.

With respect to criminal intelligence investigations, we examined whether the investigative files contained evidence of the required predication and whether the requisite notifications were made to FBI Headquarters, DOJ, and the pertinent U.S. Attorney's Office. The files we examined reflected appropriate predication for the initiation of the REIs and TEIs. However, opening notifications to DOJ and U.S. Attorneys' Offices were not evident in many of the files for REIs (71 percent and 86 percent, respectively). With respect to TEIs, 60 percent of the files did not contain evidence of required notification to the DOJ's Counterterrorism Section, and 80 percent of the files did not contain evidence of the required notification to DOJ's Office of Intelligence Policy and Review (OIPR) and

to the pertinent U.S. Attorney's Office. Although only a few files (14 percent) lacked documentation of opening notifications to FBI Headquarters, we found a general lack of consistency in the FBI's documentation practices and supervisory reviews.

#### Counterterrorism Activities and Other Authorizations

The General Crimes Guidelines contain a new Part VI, labeled "Counterterrorism Activities and Other Authorizations." This portion of the Guidelines explicitly authorizes the FBI to visit public places and attend public events on the same terms and conditions as members of the public for the purpose of detecting or preventing terrorist activities. Previously, the FBI's authority to engage in these activities generally was interpreted to be limited to the investigation of crimes or the collection of criminal intelligence only when agents had a sufficient evidentiary basis to check leads, conduct a preliminary inquiry, or conduct a full investigation.

We evaluated the timeliness and adequacy of the FBI's guidance to the field regarding these new Part VI authorities and attempted to determine how frequently these authorities were utilized. We also examined the approval process and documentation practices used by field offices.

In our interview of FBI personnel at Headquarters and the field offices, we found widespread recognition of the constitutional and privacy implications of these authorities. We also found that the FBI's Office of the General Counsel (OGC) and the Counterterrorism Division (CTD) issued periodic guidance to address sever issues pertaining to recordkeeping and dissemination of information derive from these activities.

However, we found gaps in the FBI's implementation of the Part VI authorities. Under present FBI policy, FBI agents are encouraged, but not required, to obtain supervisory approval to visit a public place or attend a public event under Part VI. They also are not permitted to document what they learn unless they obtain information that pertains to potential terrorist or criminal activity. If agents believe it is appropriate to retain information from these visits, but the information is insufficient to justify the opening of an investigation, the information is normally retained in a file called a "zero file." Zero files are maintained in field offices and contain miscellaneous information, stacked cumulatively in hard copy, without the capability to readily retrieve all information pertaining to a particular issue or threat.

Our survey of Division Counsel, the legal officers in FBI field offices, revealed that while 86 percent of Division Counsel said they have been consulted between May 2002 and February 2004 about the propriety of retaining information derived from visiting public places or attending public events, 63 percent said they believed that the FBI's guidance on this issue was not clear when the revised Guidelines were issued, and 55 percent said they believed it was still not clear 21 months later. The FBI also did not establish a Headquarters point of contact to respond to field inquiries regarding constitutional and privacy issues, including questions concerning the Part VI authorities, until March 2003, ten months after the Guidelines became effective. Further, the FBI's guidance on collecting, indexing, and disseminating information derived from the

monitoring or surveillance of protest events was not issued until September 2004.

Due to the absence of routine documentation of the FBI's use of these authorities and the FBI's practice of retaining information from these activities in "zero files," we were unable to determine how frequently the authorities are used. In May 2003, in response to a congressional inquiry, the FBI stated that its informal survey of 45 field offices indicated that agents had visited a mosque only once pursuant to Part VI. At the field offices we visited, we were told that with few exceptions agents did not have time to visit public places or attend public events other than in connection with ongoing investigations.

However, the way the information is retained makes it difficult for field managers or Headquarters to determine when these authorities are used, and whether information derived from their use is appropriately retained, indexed, and disseminated. And, unlike the practices associated with the FBI's authority to visit public places and attend public events in ongoing investigations (whether in connection with a preliminary inquiry or full investigation under the counterterrorism classification, a full investigation under the General Crime Guidelines, or under the Undercover Guidelines), neither program manager nor the Inspection Division is able to assess the exercise of these new authorities. While we understand that the FBI does not want to unduly burden case agents with paperwork and approvals, we believe that the FBI should reconsider the approval and documentation process related to Part VI authorities.

In the course of this review, news articles were published stating that the FBI had questioned political demonstrators across the United States in connection with threatened violent and disruptive protests at the Republican National Convention and Democratic National Convention held in the summer of 2004.<sup>7</sup> The initial article stated that dozens of people had been interviewed in at least six states, including anti-war demonstrators and political demonstrators and their friends and family members. Newspaper articles reported that the Department of Justice responded that the interviews were largely limited to efforts at disrupting a plot to bomb a news van at the July 2004 Democratic National Convention in Boston.<sup>8</sup>

Following publication of the new articles, several Members of Congress asked the OIG to initiate an investigation into "possible violations of First Amendment free speech and assembly rights by the Justice Department in connection with their investigations of possible protests at the Democratic and Republican political convention in Boston and New York and other venues."<sup>9</sup> Because the request coincided with the investigative work then underway in connection with this review, the OIG commenced an examination

<sup>7</sup> Interrogating the Protestors, The New York Times, Aug. 17, 2004; Eric Lichtblau, Inquiry into FBI Questioning is Sought, The New York Times, Aug. 18, 2004. A FOIA request has led to the release of some FBI documents relating to the pre-convention interviews. See Dan Eggen, Protestors Subject to 'Pretext Interviews', Washington Post, May 18, 2005; Eric Lichtblau, Large Volume of F.B.I. Files Alarms U.S. Activist Groups, The New York Times, July 18, 2005.

<sup>8</sup> Eric Lichtblau, Protestors at Heart of Debate on Security vs. Civil Rights, The New York Times, August 28, 2004.

<sup>9</sup> Letter to Glenn Fine from Congressmen John Conyers, Jr., Robert C. Scott, and Jerrold Nadler, dated August 17, 2004.

of the FBI's use of investigative authorities in advance of the national political conventions in 2004.

In examining this issue, the OIG has conducted interviews of FBI Headquarters and field personnel and reviewed FBI documents concerning the basis for the interviews referenced in these news stories. We determined that the FBI's pre-convention interviews were conducted pursuant to several different investigative authorities, only one of which falls within the scope of this review—the General Crimes Guidelines, including the authority to check leads or to conduct preliminary inquiries or full investigations. We therefore decided that in order to address fully the questions that have been raised regarding the scope of the FBI's activities in relation to the 2004 conventions, we would need to examine the FBI's use of other authorities that are outside the scope of this review, such as the authorities granted pursuant to Presidential Decision Directive (PDD) 39 and the Antiterrorism and Effective Death Penalty Act of 1996, 18 U.S.C. § 2332b(f). This aspect of our review is still ongoing. We intend to continue this review of the FBI's compliance with the pertinent authorities that applied to its actions in connection with these events, and we will produce a separate report describing our findings.

*D. Procedures for lawful, warrantless monitoring of verbal communications (Consensual Monitoring Guidelines)*

Non-telephonic consensual monitoring, including the use of body recorders and transmitting devices, is governed by the Consensual Monitoring Guidelines. We examined 103 non-telephonic consensual monitoring files that included recorded conversations to assess compliance with the Guidelines' requirements. We determined whether the files contained evidence of advice from the U.S. Attorney's Office regarding the legality and appropriateness of the monitoring, DOJ approval when monitoring "sensitive" individuals, SAC or ASAC approval prior to recording monitored conversations, and timely authorizations for extensions.

We found that 90 percent of the files were compliant with these Guidelines. The FBI requires that all consensual monitorings be requested on a standard form which addresses the requirements in the Consensual Monitoring Guidelines. We found that the consensual monitoring files consistently included evidence that the U.S. Attorney's Office had provided advice that the consensual monitorings were legal and appropriate.

However, although the standard form includes space for approvals from the SAC and DOJ, the field office we visited were not consistent in documenting these approvals. Significantly, we found that nine percent of the consensual monitoring files we examined indicated that "overhears" were recorded prior to receiving SAC or ASAC approval and that the recording of conversations occurred from 1 to 59 days prior to receiving this authorization. We were told in some offices that the SAC approval had been obtained orally prior to recording, but had not been annotated. One percent of the monitoring requests involving "sensitive" individuals did not contain evidence of written DOJ approval. In addition, we found that an ambiguity exists in the Consensual Monitoring Guidelines re-

garding the permissible duration of non-sensitive consensual monitorings.

#### *E. FBI Compliance oversight mechanisms*

Our review found that the FBI did not consistently ensure that FBI personnel with special expertise and responsibility for issues addressed in the Guidelines (such as Informant Coordinators, Undercover Coordinators, and Division Counsel) were properly consulted regarding routine investigative activities. For example, we believe the most serious violations of the Undercover Guidelines we identified during this review likely would not have occurred if the Undercover Coordinator or Division Counsel had been consulted by the case agents, even at a minimal level.

Our review concluded that Department of Justice personnel make important contributions to the oversight of the FBI's Criminal Informant Program and the FBI's use of undercover operations, including the promotion of compliance with the applicable Guidelines. This occurs through formal and informal consultations between FBI field personnel and local U.S. Attorneys' Offices, and through DOJ's membership on two key joint FBI-DOJ committees that approve and oversee certain undercover operations and confidential informants: the Criminal Undercover Operations Review Committee (CUORC) and the Confidential Informant Review Committee (CIRC). We agree with the members of these two committees, who stated that the committees are operating smoothly and that DOJ appropriately exercises oversight of sensitive criminal undercover operations and certain high-risk or sensitive confidential informants. With limited exceptions, we found good communication between the FBI and U.S. Attorneys' Offices regarding approval, concurrence, and notice issues under each of the four Investigative Guidelines.

#### *F. The FBI's implementation process for the revised Guidelines*

We assessed the FBI's implementation of the revised Guidelines, including: (1) initial planning for implementation of the revisions; (2) guidance regarding the revisions; (3) training on the revisions; and (4) administrative support for ensuring compliance with the revisions. We believe it is important to evaluate how the FBI implemented the revised Guidelines because lessons learned from this process can be useful when future revisions to Guidelines are made.

We concluded that the FBI's implementation of the revised Guidelines was problematic. Although certain FBI components undertook significant steps to implement the revised Guidelines, such as issuing guidance and providing training, insufficient planning and inter-division coordination affected important aspects of the Guidelines' implementation. Our interviews with FBI personnel revealed, for example, that no entity in the FBI made decisions regarding the priority that should be accorded to Guidelines training throughout the FBI and the form it should take. As a consequence, our surveys of FBI employees approximately two years after revision of the Guidelines revealed that although 100 percent of agents in some offices had received training on individual Guidelines,



agents in other offices had received no training. According to the surveys, most Informant Coordinators and Division Counsel believed that they, along with agents in their offices, still required additional training or guidance on the revised Guidelines.

We also found that certain of the FBI's administrative tools used to support compliance with the Guidelines were outdated or otherwise deficient. For example, with regard to the FBI's primary investigative resource manual—the Manual of Investigative Operations and Guidelines (MIOG)—it took many months, and in some cases closer to two years, for the FBI to update sections to account for the May 2002 Guideline changes. We believe that the FBI's lack of adequate attention to the implementation process contributed to many of the deficiencies we found.

#### *V. Recommendations*

It is important to recognize that the May 30, 2002, revisions to the Attorney General Guidelines were developed and issued within months of the September 11 terrorist attacks. During that period, the demands on the FBI and DOJ were extraordinary, and many of those demands continue today.

In making recommendations about the implementation of the Guidelines, we also recognize that there are inevitable tensions between promoting aggressive, proactive, and fully effective investigative tools, on the one hand, and the need to have clearly articulated Guidelines, measures to assure that the Guidelines are followed, reliable data to measure compliance, and accountability for Guidelines' violations, on the other.

We have therefore made 47 recommendations to help improve the FBI's compliance with the Attorney General's Guidelines. In general terms, our recommendations seek to ensure that:

- Agents are provided the training, administrative, and technological support they need to comply with the Attorney General Guidelines and related MIOG requirements;

- Procedures are in place to ensure that personnel at the FBI and DOJ with responsibility for implementing the Guidelines (including Confidential Informant Coordinators, Undercover Coordinators, Division Counsel, and members of the CUORC and CIRC) participate in important decisions that are made under each of the Guidelines;

- The FBI use technology to better identify, track, and monitor its Guidelines' compliance performance;

- The highly variable and often poor compliance performance of the Criminal Informant Program be remedied;

- The FBI increase inspection coverage of Guidelines-related issues, promote greater accountability for Guidelines deficiencies, and conduct more inspections of priority programs and programs experiencing significant compliance problems; and

- The FBI more effectively implement future revisions of the Guidelines through advance planning, timely guidance, better administrative support, and training of key FBI personnel.